United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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77-7205

To be argued by
W. BERNARD RICHLAND

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IMAGE CARRIER CORPORATION,

Plaintiff-Appellee,

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al.,

Defendants-Appellants.

THE HOUSE OF LITHOGRAPHY, INC., et al.,

Plaintiffs-Appellees,

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al.,

Defendants-Appellants.

On Appeal from a Judgement of the United States District Court for the Southern District of New York

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APPELLANTS' BRIEF

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APPELLANTS' BRIEF

Statement

This civil rights action for a declaratory judgment and injunctive relief was brought pursuant to 28 U.S.C. §2201 by plaintiffs, non-union printers, to declare unconstitutional as violative of the equal protection and due process clauses of the Fourteenth Amendment the defendants' policy of limiting the bidding upon and performance of printing contracts to printers whose employees are union members and who can display the union label. Violations of state law were also alleged. Jurisdiction is predicated upon 28 U.S.C. §1343(3) and 28 U.S.C. §1331(a).

Following a trial in December, 1976, Judge MacMahon rendered an opinion dated April 7, 1977, in which he found that this practice does violate plaintiffs' rights under the equal protection clause of the Fourteenth Amendment (94a).* An order of the United States District Court for the Southern District of New York was signed by Judge MacMahon on April 20, 1977 enjoining defendants from continuing to implement said policy. The order was stayed pending disposition of the instant appeal.

Question Presented

The printing industry in New York City is composed of hundreds of firms, large and small, union and non-union. The pay for union workers is presently approximately twice that paid to certain non-union workers performing similar work. At least one commentator has noted that this is a particularly strike-prone industry.

In 1934 Mayor LaGuardia, by executive order, instituted the policy here challenged. This policy deliberately favors unionized printing firms, furthering federal and state policies in favor of collective bargaining, and at the same time rendering a benefit to the City in terms of providing greater assurance that City printing contracts will not be interfered with by strikes.

The question here presented is:

Does this policy violate the equal protection clause of the Fourteenth Amendment?

*Numbers in parentheses, followed by the letter "a", refer to pages of the Appendix, unless otherwise noted.

Facts

It is undisputed that the defendants pursue a policy of restricting bidding upon and awarding of printing contracts to printers whose employees are members of a union and who are, therefore, able to affix the union label to the printed product. Exceptions to that policy include letterheads, noteheads and other items expressly excepted from a given contract (114a, 126a-127a, 132a).

The origin of the policy is an Executive Order promulgated by Mayor LaGuardia in 1934 (114a-117a, 182a-183a) pursuant to authority vested in the mayor under Chapter 1, Section 3 of the New York City Charter. The policy was adopted with the concurring votes of the Comptroller and the Corporation Counsel.

At trial, Caesar Altomare, Deputy Commissioner of the Department of Purchase, testified that the reasons for the policy are to ensure a high level of quality on jobs requiring more expertise (121a), and to ensure payment of the prevailing wage rates consistent with the New York State Labor Law, particularly with respect to overtime work which is frequently a necessity on City printing jobs (118a-120a). Mr. Altomare noted that union training schools and programs make it possible for the City to take advantage of the most up-to-date technological advances (120a). In addition, the executive resolution itself reveals a general intent to foster unionism and

collective bargaining in the printing industry to the end that "those citizens of our City engaged in the various branches of the printing industry" would benefit (182a). Mr. Anderson, attorney for plaintiffs, stated that in 1934 there may have existed good reason for the policy although he takes issue with its present role (117a).

Mr. Lee Slater, President of Image Carrier, testified that his firm was capable of doing the required work for the City and had been sent a bid form from the City indicating that the union label was a requirement. Because of this requirement, Image Carrier was deterred from bidding (144a-145a). Mr. Slater further testified that his company has one employee in the printing trades who works 37 1/2 hours per week and is paid $170 weekly and is not covered by a pension, medical or welfare plan (145a-146a).

Generally, all of the plaintiffs testified that they would be able to perform City printing contracts if permitted to bid thereon. Mr. Joel Weiss, President of Associated Litho and Letter Servicing, stated that his company could do work for the City but had been deterred from bidding by the union label requirement (109a). Associated Litho and Letter Servicing employs four people in the printing trades who generally work 36 hours per week (110a). Plaintiffs' attorney stipulated that Mr. Weiss' employees all are paid far below the prevailing wage for the work they do in the

City of New York and are not covered by a pension plan (111a-112a).

Mitchell Morgenstern, Secretary-Treasurer of the House of Lithography, testified that, although he and his partner are the only employees of his company (134a), the House of Lithography would bid on City printing contracts and has been deterred from bidding in the past by the union label policy. Plaintiff's Exhibit 6 is an invitation to bid addressed to the House of Lithography from Community School Board District 24 which was declined because of that policy (137a-139a).

Mr. Edward Blank, Director of Printing Management for the trade association known as Printing Industries of Metropolitan New York, appeared as an expert witness on behalf of plaintiffs. He testified that there are 350 open shops as opposed to 250 union shops in his organization and that the general trend in the industry is away from union shops (150a). Mr. Blank stated that quality is not related to unionism but depends entirely upon management (150a). He further stated that City contracts require a statement of the printer's overtime rates (153a), and that some open shops pay wages equal to union shops (155a). On cross-examination, Mr. Blank stated that out of the 350 open shop members of the Printing Industries of Metropolitan New York, perhaps as many as three, four or five actually pay the minimum union scale wages to some employees (162a-165a).

Following a description of the various types of printing techniques used on City jobs, Mr. Blank concluded that City work generally is very simple (156-158a). Mr. Blank testified that the open shop section of his trade organization maintains a formal training program (158a), in addition to on-the-job training provided by individual non-union shops (166a-167a), and proceeded to list some advantages open shops have over union shops. One such advantage he noted is the flexibility of employees in keeping down costs to the purchaser (158a-160a).

The attorney for plaintiffs agreed to stipulate that defendants' Exhibits A through E are union documents including a pension plan, dental benefits, and sickness, accident and surgical funds for union workers (164a).

Bernard DeSiano, a union representative called on behalf of the intervenor-defendant, testified that a multilith operator would receive, according to the prevailing union rates, $300 per week for 34 1/2 hours work (168a). A letterpress operator's minimum weekly wage is $334 without overtime (168a), and a union folder and cutter would be paid $335 per week (169a). In addition, union members are covered by a pension plan, life insurance, and hospitalization and major medical insurance (169a-170a), and get four weeks annual vacation, eleven holidays, and five days sick leave (170a).

OPINION BELOW

Following the trial, Judge MacMahon rejected abstention as inappropriate under the circumstances (91a-92a); but, finding state law and the interpretation of the New York City Charter to be "sufficiently unsettled" to warrant a decision on that basis, proceeded to determine the constitutionality of the policy at issue under the due process and equal protection clauses (92a). The Court rejected plaintiffs' unsupported allegations that the policy at issue deprives them of some liberty or property interest in violation of their right to due process, but held that the union label requirement does violate the equal protection clause (93a-94a).

Judge MacMahon, acknowledging that a presumption exists in favor of the subject classification, applied the "relatively relaxed rational basis standard" in reviewing the classification, and found that no legitimate state purpose was rationally served by the policy at issue (94a). Based on the evidence, he found that the City's interest in obtaining quality work was not better served by union shops (95a). Furthermore, he found that other procedures adequately guaranteed that prevailing wage rates would be paid, and that prevailing rates were, in fact, closer to non-union rates than the union scale (95a-96a). Judge MacMahon noted, citing the testimony of plaintiffs' expert, that "some non-union rates are as high or higher than some union rates" and "union rates vary considerably" (97a).

Finally, the Court below summarily rejected on the evidence defendants' contention that the union label facilitates review of printers' claims for overtime wages and that union training programs result in better quality products (97a).

ARGUMENT

THE POLICY OF REQUIRING THAT CITY PRINTING CONTRACTS BE PERFORMED IN UNION SHOPS AND THAT THE UNION LABEL APPEAR ON ALL PRINTED MATTER NOT EXPRESSLY EXCEPTED HAS A RATIONAL BASIS REASONABLY RELATED TO ACHIEVING A LEGITIMATE STATE PURPOSE AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

(1)

Defendants submit that the most significant purposes which the policy at issue was designed to serve are the advancement of the printing laborer, and the fostering of collective bargaining in the printing industry. See Exhibit 2 (182a). Judge MacMahon acknowledged this purpose in his decision, but failed to consider it as supplying the rational basis necessary to meet equal protection standards (95a). Inextricably related to those expressed purposes is the City's interest in ensuring industrial harmony to the end that its printing contracts may be performed timely without delay or interruption caused by labor strife.

Defendants agree with Judge MacMahon that the appropriate equal protection standard applicable to the case at bar is the rational basis test (94a). It is well-settled that there exists no fundamental right to governmental employment or government contracts, nor is the classification into union and non-union shops suspect so as to require strict scrutiny by the courts. Massachusetts Board of Retirement v. Murgia, 427 U.S.

307, 312-314 (1976); Atkin v. Kansas, 191 U.S. 207 (1903). Accordingly, with respect to state policy restricting the availability of employment opportunities, "[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 55 (1972). See Massachusetts Board of Retirement V. Murgia, supra, 427 U.S. at 314; Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Government policies involving economic discrimination are not to be set aside if any conceivable state of facts may justify it. McGowan v. Maryland, 366 U.S. 420, 426 (1961). Where a logical assumption may be made that there is a reasonable probability that the policy will achieve the desired result, the state need not verify such assumption with statistical evidence. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812 (1976). As Judge MacMahon correctly noted, under the rational basis standard, the classification herein is presumed to be valid (94a). Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. 307, 314 (1976); San Antonio Independent School District v. Rodriguez, supra, 411 U.S. 1, 55 (1972). It is, therefore, the challengers of the questioned policy who must bear the burden of proof. Morey v. Doud, 354 U.S. 457, 463 (1957).

Since 1932 it has been the policy of the federal government, as well as that of New York State, to encourage and protect the worker in his attempt to strengthen his bargaining position through combination with other workers in labor unions. Norris-LaGuardia Act, 29 U.S.C. §§101 et seq., especially §102. In 1935, the Congress of the United States passed the National Labor Relations Act expressly declaring (29 U.S.C. §151):

> "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce....
>
> . . . .
>
> "Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> . . . .
>
> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for

> the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The National Labor Relations Act (NLRA) was held to be a constitutional exercise of legislative authority premised on a legitimate government concern. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Chief Justice Hughes, speaking for the majority, stated that the right of an employee to organize and to engage in collective bargaining is fundamental (id.at 33), and held: "Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious" (id. at 44). The Supreme Court reiterated the Congressional rationale in passing the NLRA, indicating that the historical refusal to negotiate on the part of employers is so well recognized to be a primary cause of labor disturbances that judicial notice may be taken of such fact. Id. at 42. It was recognition of this economic fact of life that led Mayor LaGuardia to institute the policy at issue in 1934.

Well before the passage of federal legislation to protect the rights of labor, Judge Cardozo, speaking for a unanimous New York Court of Appeals in upholding the constitutionality of Section 220 of the New York Labor Law, acknowledged that the public policy of New York State, as declared by the Legislature 30 years before, had been to favor laborers by requiring payment of the

prevailing wage rate on public contracts. Campbell v. City of New York, 244 NY 317, 324-35 (1927). In 1937 and again in 1938, the specific policy of requiring the union label and the use of union labor on City contracts was held to be reasonable and justified in the interest of promoting fair labor practices. Amalithone Realty Co., Inc. v. City of New York, 162 Misc. 715, 716 (Sup. Ct., Spec. T., N.Y. Co.), aff'd 251 AD 450 (1st Dept., 1937); Burland Printing Co., Inc. v. LaGuardia, 9 N.Y.S. 2d 616, 618 (Sup. Ct., Spec. T., N.Y. Co., 1938 n.o.r.).

In 1937 New York reduced its already well-established policy to statutory form and enacted Section 703 of the Labor Law, guaranteeing to all employees the right to organize and bargain collectively. In 1938 the policy was embodied in the Bill of Rights of the New York Constitution (N.Y. Constitution, Art. I, §17). The labor union has thus long been woven into the fabric of American life as an essential element of our society, serving as collective bargaining agent in anticipating and resolving labor-management controversy which interrupts commerce. See Rothenberg on Labor Relations, at p. 234 (1949). In New York, as in other states, unionization and collective bargaining is so much a part of the structure of our society that it applies even to employees of State and local government. N.Y. Civ. Ser. L., Art. 14. Note also, Abood v. Detroit Board of Education, 45 U.S.L.W.

4473, 4478-79 (May 23, 1977). And for many years there has been fixed within the ambit of the powers of the City "the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services" for the City. N.Y. Mun. Home Rule L. §10[10].

(3)

At trial, Mr. Anderson, attorney for plaintiffs, admitted that a legitimate reason for the instant policy may have existed in 1934, but argued that "Today there is not" (117a). Contrary to Mr. Anderson's belief, as recently as 1976, George Meany wrote that despite the national policy to encourage collective bargaining, millions of workers are still denied their fundamental right to organize and bargain collectively by employers who use their superior strength to frustrate efforts to unionize. George Meany, "Common Sense in Labor Law," 27 Lab. L. J. 603, 604 (1976). Mr. Meany pointed out that employers still have enormous economic advantages over workers and may instill fear in employees through threats of retaliation or discharge. Even following an election in which the union has been successful, employers may refuse to bargain in good faith and thereby delay collective bargaining for as long as two or three years. Id. at 605. Mr. Meany concluded that the presence of the law alone is insufficient to protect the rights guaranteed thereby and that government coercion

may be a necessary method of securing compliance by employers. Id. at 607-608.

Mr. Meany's statements alone provide sufficient rationale for the continuance of the City government's policy of granting printing contracts only to union shops. The advantages of collective bargaining, both to the worker and to the buyers of his product, are sufficiently well-documented to warrant government's encouragement of unionism per se through the subject policy.* The exceptions to this policy in no way undermine the constitutional validity of the practice as a whole since it has been conclusively determined by the Supreme Court that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams,

*See W. Bowden, "American Labor and the American Spirit," U.S. Dept. of Labor Statistics Bull. No. 1145, pp. 6, 22-26, 31-32, 44, 56-57 (1954), in which, in addition to the improvement in the general lot of labor and the peaceful resolution of industrial disputes, the author cites control of inflation, the securing of individual liberties, redistribution of income so as to reduce extreme differentials in wealth, and increased productivity as benefits of unionism and collective bargaining.

In his book, Labor and the Common Welfare pp. vi, 8-11, 20, 175-210 (edited by H. Robbins, 1919), Samuel Gompers pointed out the contribution made by unions toward furthering the cause of democracy in America and stabilizing society against the threat of communism.

Today, unionism and collective bargaining are internationally recognized as essential to improving the living standards of the laboring classes and as contributing sig-
(footnote cont'd. on following page)

supra, 397 U.S. 471, 486-87 (1970). ** Nor must a purely economic policy, which does not infringe fundamental rights, be so strictly drawn "as to fit with precision the legitimate purposes animating it." Hughes v. Alexandria Scrap Corp., supra, 426 U.S. 794, 813 (1976).

On May 23, 1977, a unanimous United States Supreme Court reaffirmed the role of collective bargaining in maintaining employee-employer harmony and recognized that state and local governments are free to develop their

*(Footnote cont'd. from previous page)
nificantly to national development. R. Moberly, "Collective Bargaining Laws and Agricultural Employees: Some Necessary Changes," 1976 Univ. of Ill. L.F. 469, 496-503.

**The fact that the policy at issue was instituted by a municipality rather than the state has no effect upon equal protection, as it well recognized that a municipality is an arm of state government and derives its powers therefrom. National League of Cities v. Usery, 96 Sup. Ct. 2465, 2476 nt. 20 (1976); McMillen v. Browne, 14 NY 2d 326 (1964).

Furthermore, in Railway Express Agency v. New York, 336 U.S. 106, 109 (1949), the Court held municipal traffic regulations promulgated pursuant to executive authority constitutional under the due process and equal protection clauses as reasonably related to achieving a legitimate purpose. Justice Douglas found the difference between an ordinance and regulations established by the executive branch to be insignificant for equal protection purposes, holding that the municipality's reasoning must prevail where the classification bears a reasonable relationship to the purpose sought to be achieved. See generally, Matter of LaGuardia v. Smith, 288 NY 1, 6 (1972), in which the New York Court of Appeals held that the Mayor of New York City is not strictly an executive, but performs legislative and judicial functions as well, all of which are reviewable by the New York State Legislature. It may be inferred therefrom that an executive policy, particularly one which has been reinstated by every administration for over 33 years, is entitled to the same presumption of validity accorded state legislation.

own labor policies consistent with national policy of protecting the right of State and local government employees to organize and bargain collectively, even to the point of establishing an "agency shop" agreement. Abood v. Detroit Board of Education, supra, 45 U.S.L.W. 4473 (May 23, 1977).

(4)

Having articulated the dual purpose of improving the lot, and protecting the rights of the laborer, and concomitantly ensuring prompt and uninterrupted performance of government printing jobs, it is undisputable that the policy in question is reasonably related to the achievement of those purposes.

At trial plaintiffs stipulated that the plaintiffs' non-union employees are paid hourly rates far below the prevailing rates paid in New York City and do not have a pension plan (111a-112a). Testimony by one of the plaintiffs who claimed to be qualified to work for the City revealed that one of his employees is paid $170 for a 37 1/2 hour week (146a), in contrast to the union rate of upwards of $300 for 34 1/2 hours per week (168a; Exhibit F). The defendant-intervenor's Exhibits A through E demonstrate a very high level of benefits paid to union printers, in addition to pensions, dental, accident and disability, and health insurance. There was no evidence offered of any advantages to the laborer in not joining a union. Nor was there any

alternative method suggested for guaranteeing that the City's objective of aiding the worker would be achieved.

Judge MacMahon found that "some non-union rates are as high or higher than some union rates" (96a). His conclusion was based entirely upon the testimony of plaintiffs' expert who stated that perhaps as many as three, four or five non-union employers paid wages as high as the union scale (163a). This number represents an inconsequential, if not infinitesimal, percentage of the approximately 350 non-union firms in Mr. Blank's organization. Moreover, Mr. Blank indicated that these high rates are not generally paid across the board to all employees, but are frequently given to a few select employees who are of particular value to their employers (164a-165a). This evidence, relied upon by the Court below, clearly establishes beyond dispute that union members are generally better paid than non-union employees.*

At trial, Mr. Altomare of the New York City Department of Purchase testified that City printing contracts frequently call for overnight deadlines, for example, where an election has been scheduled and there are last-minute changes in the ballot (119a), or where law requires immediate publication of legislative and

*Such conclusion is further supported by the extensive statistical analysis of the effect of unionism on wages contained in Unionism and Relative Wages in the United States by H. Gregg Lewis (1963), in which the author states that the wages of union workers are generally 7 to 11% higher than the average (at pp. 2, 5).

executive actions (120a). A union shop in which the working conditions have been established through collective bargaining is a more reliable supplier of printing services than a non-union shop in which labor-management disputes are likely to disrupt production at any time. In his study of the International Typographical Union, the membership of which includes printing workers in New York City, Seymour Lipset states that printing workers have a greater propensity to strike than other types of laborers. S.M. Lipset, Union Democracy, at p. 26 (1956). Thus, as the laborer benefits under the policy, so does the City in ensuring that deadlines will be met and strikes avoided.*

(5)

The United States Supreme Court recently affirmed without opinion the decision of a Florida District Court upholding a Florida requirement that public printing be done within the state. American Yearbook Co., Inc. v. Askew, 339 F. Supp. 719 (M.D. Fla., 1972, three judge court), aff'd, 409 U.S. 904 (1972). Judge MacMahon rejected

*In When Workers Organize: New York City In The Progressive Era (1968), Melvyn Dubofsky recites the history of the labor movement in New York City. He notes the unique labor situation in this City in which certain industries, particularly printing, are dominated by numerous small businesses which are subject to frequent market fluctuations. The competition among these employers is fierce, and "[s]ince the wage bill was the most elastic of variable costs, small employers struggled to maintain low wage rates and bitterly fought trade-unions, making initial organization difficult" (at p. 6). Such circumstances (footnote cont'd. on following page.)

that decision as inapplicable because it dealt only with a geographical restriction (93a). Appellants submit, however, that the reasoning of that decision is determinative of the instant appeal.

Relying on Atkin v. Kansas, supra, 191 U.S. 207 (1903), the Florida Court distinguished the State's power to regulate private business as sovereign and governor from its own proprietary or business power to enter into contracts and held (339 F. Supp. at p. 722-723):

> "[I]n framing specifications for its printing work, the state performs a proprietary function and stands in the shoes of a private party who is entitled in most instances to choose where and by whom his printing will be done.... It may be necessary for the state to adopt discriminatory purchasing policies, such as those questioned here, to insure that the interest of the people is best served."

*(footnote cont'd. from previous page.)
necessitated the development of a government policy that would assist workers in overcoming the obstacles to collective bargaining.

Mr. Dubofsky further cites to the pattern of frequent crippling organizational strikes in New York City which caused severe hardship both to the public and to the municipal government. (pp. 42 et seq., 103, 108). The reason for the strikes was generally management's resistance to dealing with the union. The mayors of New York City expended considerable time and effort in seeking to resolve these labor disputes (pp. 103-104, 126 et seq.). Mr. Dubofsky states (at 41): "Where organized labor triumphed, compromise resulted...", and so were served the ends of both employee and employer in creating industrial discipline and peace (p. 40-41).

From Mr. Dubofsky's analysis, the logic of establishing the policy at issue is readily perceived. Not only were the ends of industrial stability achieved, but the waste in time and inefficiency which was taxing municipal resources could be eliminated.

In Atkin v. Kansas, supra, 191 U.S. 207, 222 (1903), the Supreme Court itself unequivocally stated:

> "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities... Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

Accord, Perkins v. Lukens Steel Co., 310 U.S. 113, 125-129 (1940), in which the Court found that the government's power to contract for the purchase of goods and services is properly vested in the executive branch, and McMillen v. Browne, supra, 14 NY 2d 326, 331 (1964), in which the Court of Appeals held that New York City has the same power to fix terms and conditions of contract as a private corporation.

(6)

Surely, it cannot be disputed that the private corporation may, if it sees fit, contract for services and supplies only with union suppliers. The law is clear that the state and municipality have the same prerogatives. A rational basis for the questioned policy has been demonstrated: to promote the economic

interests of the worker, to ensure that the fundamental right to organize and bargain collectively will not be prejudiced, and to protect the City from disruptions resulting from labor strife. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy" (Dandridge v. Williams, supra, 397 U.S. 471, 486 (1970)), nor does it "protect a business against the hazzards of competition" in meeting the requirements of the purchaser (Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 170 (1934)). See also, McGowan v. Maryland, supra, 366 U.S. 420 (1961); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-489 (1955).

The evidence establishes that unionism per se benefits the municipality administratively and furthers the recognized state and federal social policy of fostering labor organizations and collective bargaining. It is uncontested that the policy of restricting bidding upon and awarding printing contracts only to union shops has the predictable effect of promoting unionism. Thus, it is clear that the policy at issue does rationally further a legitimate, articulated state purpose and is in no way invidious or violative of the rights of plaintiffs. San Antonio Independent School District v. Rodriguez, supra, 411 U.S. 1, 17 (1972). It does not violate the equal protection clause of the

Fourteenth Amendment.

(7)

Plaintiffs also alleged that the subject policy violates due process. Appellants submit that Judge MacMahon correctly rejected such argument based upon the legal principle, heretofore set forth, that plaintiffs do not have a right to government employment and, therefore, could not have been deprived of that right without due process. See argument, supra at 9-10, 19-21.

To the extent that the due process claim raises the issue of arbitrary or irrational action by the appellants, the justification for the policy set forth with respect to equal protection is equally applicable to due process.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

June 15, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel
for the City of New York,
Attorney for Appellants.

LEONARD KOERNER,
CAROLYN E. DEMAREST,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS

being duly sworn, says that on the 17 day of June 1977, he served the annexed APPELLANTS- BRIEFS upon Loomis, Owen, Fellman, Coleman Esq., the attorney for the Opposing Attorney herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 20 20 K ST. N.W. in ~~the Borough~~ of WASHINGTON, D.C. ~~City of New York~~, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 17 day of June, 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

James Burns

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STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

BRIAN SUGDEN

being duly sworn, says that on the 17 day of June 1977 at No. 220 East 42nd St in the Borough of MAN'H in NEW YORK CITY, h served a copy of the annexed APPELLANTS' BRIEF upon TOWNLEY & UPDIKE Es the Attorney for the PLAINTIFF in the within entitled action by delivering a copy of the same to a person in charge of said Attorney's off and leaving the same with him.

Sworn to before me, this 17 day of June 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Brian Sugden

ATE OF NEW YORK :
SS.:
UNTY OF NEW YORK :

BRIAN SUGDEN

ing duly sworn, says that on the 17 day of JUNE 1977

No. 130 East 40th St. in the Borough of MANH in NEW YORK CITY, he

rved ~~a~~ 3 copy(ies) of the annexed APPELLANTS BRIEF upon MENAGH, TRAINOR & POTHFELD Esq.

e Attorney for the INTERVENOR (ALLIED PRINTING TRADES) in the within entitled action,

delivering ~~a~~ 3 copy(ies) of the same to a person in charge of said Attorney's office,

i leaving the same with him.

orn to before me, this 17 :

y of June 1977

Brian Sugden

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner